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No. 91-1111

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., et al.,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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(For Further Appearances See Reverse Side of Cover)

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STATEMENT PURSUANT TO RULE 29.1

Merrett Underwriting Agency Management Limited is wholly owned by Merrett Holdings PLC.

Three Quays Underwriting Management Limited is wholly owned by Cater Allen Holdings PLC.

Edwards & Payne (Underwriting Agencies) Limited is wholly owned by Sturge Group PLC.

No other of these respondents has any parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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Respondents Merrett Underwriting Agency Management Limited, Robin A.G. Jackson, Three Quays Underwriting Management Limited, Janson Green Management Limited, Edwards & Payne (Underwriting Agencies) Limited, C.J.W. (Underwriting Agencies) Limited, Lambert Brothers (Underwriting Agencies) Limited, and R.K. Carvill & Co., Ltd., respectfully submit this response in support of the *Petition for a Writ of Certiorari* in No. 91-1111, arising out of the decision of the United States Court of Appeals for the Ninth Circuit in *In re Insurance Antitrust Litigation*.

The petition in No. 91-1111 concerns those claims in the complaints that allege that cooperation and consultation by domestic and foreign insurers and reinsurers regarding the terms and conditions of insurance coverage to be included in new policy forms violated the antitrust laws. The court below held

that the presence of foreign defendants negated any possible application of the McCarran-Ferguson Act's antitrust immunity for the business of insurance because, in the court's view, those foreign defendants are not subject to regulation by the plaintiff states or the states from which private plaintiffs hale.[1] The Ninth Circuit also held that the agreement on terms and conditions of coverage alleged in the complaint could constitute a "boycott," and that the fact that certain states had approved the end result of the alleged conspiracy – new policy forms – did not implicate the "state action doctrine." Petitioners in No. 91-1111 are the U.S. insurers, reinsurers and trade association defendants who are alleged to have conspired with English reinsurers and brokers to attempt to change the primary insurance forms proposed to be used in the marketplace. These respondents are the foreign reinsurers and brokers with whom the domestic defendants supposedly conspired, and they are defendants in several of the claims at issue.

Respondents support each of the three points raised in the petition.

1. First, the Ninth Circuit's ruling that participation of foreign reinsurers in the process of developing new U.S. policy forms – a process overseen by state regulators – destroys McCarran Act protection for all participants is contrary to congressional intent and reflects a fundamentally unsound policy. As stated in the petition:

[1] Some of the foreign defendants in the counts at issue in No. 91-1111 are also named in three different and discrete counts that are concerned entirely with foreign actors and conduct. Those counts allege that London market brokers and underwriters agreed on terms and conditions of reinsurance and retrocessional reinsurance they would provide in London for American risks. The district court dismissed those three counts, finding that to exercise antitrust jurisdiction over them would violate principles of international law and comity, but held in the alternative that if the foreign defendants' foreign conduct could be subject to U.S. antitrust laws, that same conduct would also be regulated by the states for purposes of the McCarran-Ferguson Act. (58a) (Citation to the Appendix to the Petition for a Writ of Certiorari in No. 91-1111) In No.91-1128, the defendants in those counts have petitioned this Court for a writ of certiorari to review the Ninth Circuit's reversal of the district court's comity ruling.

> Communication and agreement among primary insurers and reinsurers, including foreign reinsurers, are a necessity in the business of insurance . . . (I)t is evident that the normal operations of the business of insurance require that domestic primary insurers be free to confer and agree with foreign reinsurers no less than with domestic reinsurers over the terms and conditions of insurance.
>
> Such communication and agreement fall squarely within the terms of the McCarran-Ferguson Act.

Petition at 14-15. If the ruling of the Ninth Circuit stands, the conduct of the business of insurance will become infinitely more difficult and problematic for both domestic and foreign participants, who will be unable to do normal business together without facing the risk of antitrust exposure. The ruling below will upset decades of understanding that agreements on the terms and conditions of domestic insurance and reinsurance are within the scope of the McCarran-Ferguson Act even though some of the parties involved are foreign. Again, as petitioners state,

> collaboration [of the domestic insurance industry] with foreign reinsurers is – and was in 1945, as Congress specifically recognized – an integral and extensive part of the business of insurance that is subject to state regulation.

Petition at 12.

The primary question in considering whether a given activity is or is not within the scope of the McCarran-Ferguson Act is not whether all of the individuals or entities involved are themselves regulated by the state, "but whether the antitrust challenge relates to the 'business of insurance.'" *Petition* at 16. In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), this Court held that application of the McCarran-Ferguson Act depends not on the identity of each of the participants in the challenged activity, but on the conduct or practice at issue. The

chiropractic peer review practice challenged in *Pireno* was held outside the business of insurance because such third-party arrangements, which have only an ancillary effect on policyholders, were not at the core of congressional concern during the passage of the McCarran-Ferguson Act. *Id.* at 133; *accord*, *Fabe v. U.S. Dept. of the Treasury*, 939 F.2d 341, 346 (6th Cir. 1991). The conduct at issue here, by contrast, involved the development of policy forms for consumers. Nothing could be more central to the conduct of the business of insurance than agreement on the terms and conditions of coverage as reflected in the development of standard insurance forms – precisely the activity challenged here.

The *Pireno* court set forth a three-part test for determining whether certain conduct is part of the "business of insurance." One prong of the *Pireno* test looks to "whether the practice is limited to entities within the insurance industry," but the Court stressed that no one factor is determinative, and that a practice does not lose McCarran-Ferguson protection solely because it involves parties outside the insurance industry. 458 U.S. at 129, 133.

If this Court was prepared in *Pireno* to hold that protection under the McCarran-Ferguson Act was not forfeited by virtue of the participation of noninsurance entities (which indisputably could not be subject to state regulation within the meaning of McCarran-Ferguson) in the conduct at issue, then it should not accept the ruling below, which allows that protection to be forfeited merely because some of the participants were foreign, even though all were entities within the insurance industry. Even assuming it to be true that when foreign reinsurers act alone, their conduct cannot be regulated by state law for purposes of the McCarran-Ferguson Act because states cannot regulate insurance transacted beyond their own borders (*see* 18a-20a), the claims at issue here allege conduct in the business of insurance that was clearly subject to pervasive state regulation. There is thus no justification for withdrawing the protection Congress extended to such activity.

2. The Ninth Circuit's radical expansion of the "boycott" exception to the McCarran-Ferguson Act also merits this Court's

attention. The court in essence ruled that agreement on terms and conditions of coverage – the quintessential insurance activity protected by the McCarran-Ferguson Act – becomes a prohibited "boycott" once the agreed upon terms are presented to the marketplace. As petitioners note, "the court's opinion provides *no* meaningful standards to distinguish permissible joint activities from impermissible boycotts." *Petition* at 12-13 (emphasis in original). In the real world of domestic and international insurance and reinsurance in which respondents trade every day, the question of what agreements on coverage terms are or are not "boycotts" is far from academic. In the London market where respondents trade and which depends on speed and efficiency, virtually every large reinsurance treaty is subscribed to by many Lloyd's syndicates and London Market Companies. If respondents' London market conduct is to be held subject to the antitrust laws, they are entitled to know which, if any, aspects of their daily existence are now suddenly to be labeled "boycotts."

3. Finally, respondents agree with petitioners that this Court should review the Ninth Circuit's conclusion that the state action doctrine has no application to lawsuits challenging the use of insurance policy forms that were formally reviewed and approved by state insurance authorities. As petitioners note: "Far from rubber-stamping the forms, the regulators examined them and in many instances either modified them directly or disapproved them until modifications were made." *Petition* at 28. Furthermore, also as put by petitioners, in the regulatory review process "the views expressed by foreign reinsurers during the development of the forms and the potential impact of the claims-made form on the availability of occurrence policies were matters of public record and were specifically discussed by a number of state insurance commissioners." *Petition* at 6. The Ninth Circuit ruling puts respondents in the position of discovering after the fact that they could be sued in antitrust for a policy decision made by state regulators before whom they had presented arguments for the incorporation of the terms they desired in policy forms presented to state regulators for ultimate approval.

CONCLUSION

The petitioner for a writ of certiorari should be granted.

Respectfully submitted,

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